

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 2000-F-11

Date issued: April 4, 2000

Requested by: John R. Gregg, Bottineau County State's Attorney

- QUESTION PRESENTED -

Whether an order of the Board of County Commissioners to close a portion of an unimproved section line road under N.D.C.C. § 24-07-03, but which has not been filed as required by N.D.C.C. § 24-07-14, will conclusively be deemed effective three years after its adoption pursuant to N.D.C.C. § 11-10-27.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that, pursuant to N.D.C.C. § 11-10-27, the order will be conclusively presumed to have been correctly adopted, including filing under N.D.C.C. § 24-07-14, three years after a board of county commissioners closes a portion of an unimproved section line road under N.D.C.C. § 24-07-03.

- ANALYSIS -

A board of county commissioners is authorized to close an unimproved section line road to travel under certain circumstances. N.D.C.C. § 24-07-03. The procedure to be followed by the board of county commissioners is found in N.D.C.C. § 24-07-03 and the other laws governing procedure in chapter 24-07, except where modified by section 24-07-03. See Hillsboro National Bank v. Ackerman, 189 N.W. 657, 659 (N.D. 1922) (a road may be opened along a section line by compliance with the predecessor to N.D.C.C. § 24-07-03 "and other relative laws"). One statutory requirement contained in chapter 24-07 and not modified by N.D.C.C. § 24-07-03 is the requirement that the decision made by the board of county commissioners must be incorporated into an order signed by the board members and filed with the office of the county auditor. N.D.C.C. § 24-07-14.

The legislature has provided for the possibility that the order may not be filed, stating: "In case the board having jurisdiction fails to file such order within 20 days, it must be deemed to have decided against such application." N.D.C.C. § 24-07-14. If this provision is mandatory and jurisdictional, then the failure to file the order with the county auditor within 20 days would nullify the board's decision. The North Dakota Supreme Court has adopted a test to determine whether a tax related provision is mandatory or directory.

If the provision is mandatory it must be followed or the assessment will be invalid; but if it is merely directory, the assessment is not necessarily invalid because of failure to observe the statute. The test is whether the provision is for the benefit and protection of the individual taxpayer. If it is, the provision is mandatory. On the other hand, if the regulations are designed to secure order, system and dispatch in proceedings, and the rights of interested taxpayers cannot be injuriously affected, the provisions are merely directory.

Fisher v. Golden Valley Bd. of County Comm'rs, 226 N.W.2d 636, 645 (N.D. 1975), quoting Cooley on Taxation, 4th Edition, Vol. 3, § 1061. It appears reasonable to apply this standard to other statutes addressing procedural matters. See generally Schwind v. Director, North Dakota Dept. of Transportation, 462 N.W.2d 147, 150 (N.D. 1990).

The North Dakota Supreme Court has determined that the identically-worded predecessor to N.D.C.C. § 24-07-14 created a disputable presumption and was "enacted largely for the purpose of fixing the time in which either party might appeal from the decision of the board." Kleppe v. Odin Tp., McHenry County, 169 N.W. 313, 315 (N.D. 1918). The court added, as dicta, that there also was authority to preclude the landowner from questioning whether the filing had occurred because the county board opened the road by order in 1901 and the case was not brought until approximately 17 years later. Id. In another case, a landowner obstructed a highway and claimed that it had not been properly laid out under law. Rothecker v. Wolhowe, 166 N.W. 515 (N.D. 1918). The court held that in spite of the statute requiring filing, "it may be that, if there was positive proof that the order for laying out the highway had been entered, the defendant would be estopped to deny the existence of the road, since he himself signed the petition." Id. at 518. The court continued that the landowner could file an action for damages based on the taking of his property for the highway. Id.

Therefore, the Supreme Court has not interpreted this presumption as mandatory or as creating a jurisdictional defect. The purpose of this presumption is to provide evidence of the board's decision for purposes of appeal. "[I]n North Dakota an appeal lies from the determination of the commissioners, both as to the route to be taken and the damages to be awarded." Semerad v. Dunn County, 160 N.W. 855, 857 (N.D. 1916). See also N.D.C.C. § 24-07-22. The order laying out, altering, or discontinuing the highway, or a certified copy of the order, is statutory evidence of the facts contained in the order and is prima facie evidence of the regularity of the proceedings prior to making the order, except in an appeal which has been taken within the

proper time limitations. N.D.C.C. § 24-07-15. The presumption is best described as an evidentiary rule which preserves the status quo unless proof may be found of the board's actual decision. Therefore, filing this document is not a mandatory requirement for enforcement of the board's order.

The legislative assembly has provided a period of repose after which the regularity of adoption or enactment of laws by a board of county commissioners is not subject to question, specifically stating:

Three years after adoption or amendment of a resolution or the enactment or amendment of an ordinance by the board of county commissioners it is conclusively presumed that the resolution or ordinance was adopted, enacted, or amended and published as required by law.

N.D.C.C. § 11-10-27. An order to close an unimproved section line under N.D.C.C. § 24-07-03, after three years, would be subject to the conclusive presumption of correctness created by N.D.C.C. § 11-10-27, despite any failure to file the order as required under N.D.C.C. § 24-07-14, because the filing of that order and the disputable presumption against adoption of the order if it is not filed are not mandatory. It is important to note, however, that the period of repose in N.D.C.C. § 11-10-27 applies to the manner in which the order was issued, and not to the legality of the order itself.

Therefore, it is my opinion that, pursuant to N.D.C.C. § 11-10-27, the order will be conclusively presumed to have been correctly adopted, including filing under N.D.C.C. § 24-07-14, three years after a board of county commissioners closes a portion of an unimproved section line road under N.D.C.C. § 24-07-03.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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